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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDDIE BURRELL, ET AL.,
APPELLANTS

v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI,
ET AL.,
APPELLEES

On Appeal from the United States District Court for the Southern District of Mississippi

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the plaintiffs have the burden of proving discrimination where an election held in violation of § 5 of the Voting Rights Act effects a permanent change in the state law.

2. Whether a substantial transfer of authority from one elected body to another, elected by a different constituency, must be approved under § 5.

3. Whether state action in violation of state election law may constitute a change requiring approval under § 5.

4. Whether plaintiffs may be estopped to assert a denial of equal access to the political process under § 2 of the Voting Rights Act or may be required to prove that the election outcome would have been different in the absence of such denial.

5. Whether the District Court properly followed *Hunter v. Underwood*, 471 U.S. 222 (1985), in concluding the Mississippi legislature lacked discriminatory intent.

6. Whether mere "political clout" is a legitimate state interest under the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

The appellants in this action were plaintiffs in the District Court. They are Eddie Burrell, Albert Butler, John D. Eggleston, Charles Johnson, and Kenneth Vaughan, individually and in their official capacities as members of the Claiborne County Board of Supervisors; Willie Buck, Sr., Stella H. Jennings, Gerald B. Mitchell, Jr., and William H. Moulder.

The appellees in this action were defendants in the District Court. They are William A. Allain, Governor of the State of Mississippi, Edwin Lloyd Pittman, Attorney General of the State of Mississippi, and Dick Molpus, Secretary of State of the State of Mississippi, in their official capacities as members of the Mississippi State Board of Election Commissioners; Mississippi State Board of Election Commissioners; C.A. Marx, Nicki Martinson, and W.A. Wilkerson, in their official capacities as members of the Mississippi State Tax Commission; Mississippi State Tax Commission; and the State of Mississippi.

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I. The District Court erred in placing on the plaintiffs the burden of proving discrimination and in failing to enjoin or to vacate an election held in violation of § 5 of the Voting Rights Act which effected a permanent change in Mississippi law.

II. The District Court erred in ignoring precedent which requires transfers of governmental authority to be approved under § 5.

III. The District Court erred in holding that state action contrary to state law cannot come within the scope of § 5.

IV. The District Court erred in holding plaintiffs estopped to assert a denial of equal access to the political process under § 2 and in requiring proof that the election outcome would have been different had equal access not been denied.

V. The District Court erred in failing to find a discriminatory purpose on the part of the state in enacting and administering S.C.R. No. 519, H.C.R. No. 41 and H.B. No. 388.

VI. The District Court erred in finding "political clout" to be a legitimate state interest under the Equal Protection Clause of the Fourteenth Amendment.

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EDDIE BURRELL, ET AL.,
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v.

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Southern District of Mississippi in this case was announced from the bench on December 18, 1986; a transcript is set out in Appendix A. The Court's judgment of December 31, 1986, from which this appeal is taken, is set out in Appendix B. A motion by these appellants to amend the judgment was granted on January 15, 1987; a copy of that order is set out in Appendix C, and a copy of the amended judgment is set out as Appendix D. Copies of the Court's opinion from the bench of May 30, 1986, and corresponding order of June 17, 1986, denying the plaintiffs' motion for a preliminary injunction, and its order of November 17, 1986, granting partial summary judgment to both parties, are set out as Appendices E, F and G.

JURISDICTION

This action challenges two Mississippi constitutional amendments and one Mississippi statute under the Fourteenth and Fifteenth Amendments to the United States Constitution and §2 and §5 of the Voting Rights Act, 42 U.S.C. §§1973, 1973c. A three-judge court was convened pursuant to §5; jurisdiction was conferred upon the District Court by §5 and 28 U.S.C. §1331. The District Court entered its judgment on December 31, 1986, and it granted a motion to amend the judgment on January 15, 1987. On January 29, 1987, within the time permitted by 28 U.S.C. §2101(b), the appellants filed with the District Court their notice of appeal, a copy of which is set out as Appendix H. This appeal is being docketed in this Court within 60 days from the filing of the notice of appeal and within 90 days after the entry of the judgment, as provided by this Court's Rule 12.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

CONSITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the Fourteenth and Fifteenth Amendments to the United States Constitution, sections 2 and 5 of the Voting Rights Act, the Tax Injunction Act (28 U.S.C. §1341), sections 70, 112 and 273 of the Mississippi Constitution, Senate Concurrent Resolution No. 519, House Concurrent Resolution No. 41, House Bill No. 388, and pertinent portions of the Mississippi Code, are set out in Appendix K.

STATEMENT OF THE CASE

The appellants are a biracial group of voters and elected officials of Claiborne County, a Mississippi River county of 12, 279 people, 74.5% of whom are black. Having the second highest concentration of minorities in the state, the county has long been extremely poor. Forty-two percent of its families were below the poverty level in 1969 and 26% in 1979. In 1984, the unemployment rate was 12.4%, and 93.9% of the county's registered job applicants in 1985 were black. While the unemployment statistics are not broken down by race, the 643 black job applicants represent 7.0% of the total black population of the county; since many black residents are either too old or too young to work, it is fair to conclude that black unemployment must be enormous.[1] While the county's income figures are not broken down

[1]These figures are drawn from Ex. P-133 and P-134. All citations to exhibits and depositions refer to the trial record compiled in the District Court.

by race, for Mississippi as a whole in 1980 the median family income for blacks was 52.21% of that for whites. App. I, pretrial order, ¶8.q.

This Court has long been intimately familiar with the history of blatant racial discrimination against black citizens of Claiborne County. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 898-906 (1982); *Connor v. Finch*, 431 U.S. 407, 424-25 (1977); *Allen v. State Board of Elections*, 393 U.S. 544, 550-51, 576-79 (1969);[2] *United States v. Mississippi*, 380 U.S. 128, 142-43 (1965), rev'g 229 F. Supp. 925, 932 (S.D. Miss. 1964). None of the black members of the Board of Supervisors, appellants herein, were elected until 1975, and the county had its first opportunity to elect a black to the House of Representatives in 1979. Even today, the government of Port Gibson, the county seat, is all white. App. I, pretrial order, ¶8.c.

The great engine of change in Claiborne County has been the decision of Middle South Utilities to build a nuclear electrical generating plant at Grand Gulf. In 1975, the county's last year under an all-white Board of Supervisors, the county's total assessment base was approximately $20,000,000; by 1984, the tax rate had been cut by a third, but the tax base had risen to almost $350,000,000, of which approximately $325,000,000 was attributable to the Grand Gulf Plant. Ex. P-97. Thus, by 1985 the black-majority Board of Supervisors was admninistering a county budget of $16,700,000, and was for the first time providing desperately needed improvements in health, eduation, and economic development for the poor citizens of the county. Ex. P-154.

The good fortune of a poor black county did not go unnoticed by its neighbors. As early as 1977, efforts were made in the legislature to distribute the tax base being developed at Grand Gulf among the local governments in the Mississippi Power and Light Company service area. Ex. P-1. In 1983 the Mississippi House of Representatives passed H.B. No. 961, Ex. P-3. which would have distributed 75% of the assessed valuation of all electrical generating plants around the service area, thus permitting each jurisdiction to apply its own tax rate to a portion of each plant. However, H.B. 396 as passed by the House in 1984, Ex. P-5, applied only to Claiborne County. Moreover, it entirely exempted Grand Gulf from local taxes, and imposed a state tax in lieu thereof, thus denying the county the right to set its own tax rate on any portion of the property.

By 1985 proponents of Grand Gulf redistribution had discovered that

[2]The challenged statute deprived Claiborne County of its right to elect its superintendent of education. App. I, pretrial order, ¶8.kk.

the in-lieu tax would violate §112 of the Mississippi Constitution, which expressly protected a county's "right to levy county and special taxes upon such assessment" of corporate and utility property. *Chicago R.I. & P.R. Co. v. Robertson*, 122 Miss. 417, 84 So. 449 (1920). Consequently, the House, considering an amendment to §112 dealing with the reclassification of property taxes,[3] voted to remove that protection from Claiborne County.[4] However, the white senator from Claiborne County, Jay Disharoon, told his colleagues that the proposal constituted a "white Legislature coming down on a black county." He continued, "You can't single out Claiborne County. It's either all or nothing." Ex. P-103. Douglas Anderson, one of two blacks in the Senate, agreed, arguing that "if it can be done to Claiborne County, it can be done to Harrison or Hinds or any other county." *Id.* On the last vote of the session, the amendment failed by a single vote in the Senate. 1985 Senate Journal 2445.

The issue returned in 1986 as H.C.R. No. 41, proposing to amend §112 to authoize the legislature to transfer taxing authority over Grand Gulf from Claiborne County to the State and to distribute the funds. During consideration on the floor, the House again adopted the proviso developed the previous year, assuring that all counties other than Claiborne would retain the constitutional protection of their right to tax utility property. As Representative Eric Clark explained his amendment:

> The way the resolution reads now, language was deleted from

[3] Both S.C.R. No. 519 and H.C.R. No. 41, the 1982 and 1986 amendments to §112 challenged in this action, involve the reclassification issue, as well as Claiborne County's right to tax Grand Gulf. Although §112 had commanded equality in asseessment and tax rates, Mississippi homes and farms historically had been grossly underassessed. After the Supreme Court ordered equalization enforced in *State Tax Commission v. Fondren*, 387 So.2d 712 (Miss. 1980), cert. denied, 450 U.S. 1040 (1981), the legislature proposed S.C.R. No. 519 and H.C.R. No. 41 so as to legitimize lower assessments for some classes of property. While S.C.R. No. 519 on its face does not deal with the taxation of nuclear plants, the defendants assert that it overrules the *Chicago* case and authorizes the imposition of an in-lieu tax.

[4] The House leadership sought to repeal that language without explaining its import to the membership. Joint Ex. 1 at 79-80. By the time the amendment returned from conference with the Senate, representatives of other counties having utility property had come to understand the threat, *id.*, at 95-97, and they defeated the first conference report. The conferees then restored the existing language, but added a new proviso removing that protection solely from the nuclear plant in Claiborne County. Ex. P-37. Happy to take Claiborne County's money so long as their own was protected, the requisite two-thirds majority of the House supported the second conference report.

> the constitution which guarantees the right of counties to levy taxes against utility and other corporate property. This amendment would put that guarantee back in the Constitution with one exception. And the one exception would be nuclear generating plants....

Joint Ex. 1 at 203-04. Of course, the only taxable nuclear generating plant in Mississippi is at Grand Gulf. Although Mississippi law ordinarily requires special elections on proposed constitutional amendments to be held in November, Miss. Code Ann. §23-5-203 (Supp. 1986), H.C.R. No. 41 set the election on this proposed amendment for June 3, 1986, only two months after its approval by the Legislature.

The only real controversy on H.B. No. 388, the bill implementing the new constitutional authority, involved how big the tax was going to be. Claiborne County wanted as large a tax as possible; the larger the pie, the larger Claiborne County's slice would be. The House leadership strongly resisted efforts to increase the tax rate from 2% to 3% or 4%. It was this very issue which led Chairman Merideth of the Ways and Means Committee to exclaim to his colleagues that the citizens of Claiborne County lacked the capacity for self government: "I want to tell you, they got no government over there. The money can't be spent wisely." Ex. P-11. Because of these convictions, the House conferees refused to bring out a report with a tax greater than 2%.[5]

The State's submission of H.C.R. No. 41 to the United States Department of Justice for approval under §5 of the Voting Rights Act was limited to the date of the special election. However, the Department's approval was not secured before the election, and these plaintiffs filed this action on May 23, 1986, seeking to enjoin the conduct of the election. Despite the District Court's agreement that preclearance was required, it refused to enjoin the election, concluding that the plaintiffs had not carried the burden of proving that such relief was appropriate and explicitly holding that their failure to present evidence of intentional discrimination on the part of the legislature should be held against them. App. F. The amendment was narrowly adopted by less then 51% of the vote, and, after postclearance by the Department on July 7, 1986, the Court permitted the amendment to go into effect.

The plaintiffs amended their complaint to attack the State's failure to secure preclearance of H.B. No. 388, which deprives the black ma-

[5]In the words of Representative Clark, the House eventually "accepted the bill, believing that this at least was something, and they might not get anything, in terms of tax money to their counties, if the bill was sent back to conference again." Clark deposition at 14.

jority of Claiborne County of jurisdiction over its tax revenues, transferring that authority to an overwhelmingly white legislature elected by a majority white population. The complaint also assailed the failure to submit the substance of S.C.R. No. 519 and H.C.R. No. 41, insofar as they authorized the discriminatory effect of H.B. No. 388. The plaintiffs also complained of the State's failure to seek approval of the election held pursuant to S.C.R. No. 519 and of several procedures used in conjunction with both elections, including the failure to print the text of the proposed amendments on the ballot in many counties. The plaintiffs also asserted that all of these election procedures resulted in racial discrimination, in violation of §2 of the Voting Rights Act. They further alleged that S.C.R. No. 519, H.C.R. No. 41, and H.B. No. 388 were adopted with a racially discriminatory purpose, and that they lacked a rational relationship to any legitimate state interest, in violation of the Fourteenth and Fifteenth Amendments.

On November 17, 1986, the District Court rendered partial summary judgment, dismissing the Voting Rights Act claims regarding S.C.R. No. 519 and H.B. No. 388. At the same time, the Court struck the defendants' claim that the Tax Injunction Act, 28 U.S.C. §1341, barred plaintiffs' remaining claims against H.C.R. No. 41 under the Voting Rights Act. On December 18, 1986, after a three day trial, the Court held that §1341 did require dismissal of the constitutional claims asserted in the complaint. The Court found that the challenged measures were not the result of racially discriminatory motives, and that the shortened campaign provided by the June election date did not result in discrimination in violation of §2. Although the conduct of the election did violate §5, the Court refused to vacate the election results, because of its conclusion that the plaintiffs had failed to prove a violation of §2. Judgment was entered in accordance with the Court's opinion on December 31, 1986.[6]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE DISTRICT COURT ERRED IN PLACING ON THE PLAINTIFFS THE BURDEN OF PROVING DISCRIMINATION AND IN FAILING TO ENJOIN OR

[6]The plaintiffs filed a separate state action challenging these measures under the Mississippi Consitution. Although the Chancery Court dismissed the complaint, the Supreme Court of Mississippi on February 10, 1987, enjoined the distribution of funds under H.B. No. 388 pending disposition of that appeal.

TO VACATE AN ELECTION HELD IN VIOLATION OF §5 OF THE VOTING RIGHTS ACT WHICH EFFECTED A PERMANENT CHANGE IN MISSISSIPPI LAW.

The District Court properly concluded that the setting of a date for the 1986 special election constituted a "standard, practice, or procedure with respect to voting," within the meaning of §5. *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985); *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984).[7] Nevertheless, the Court refused to enjoin the 1986 election, concluding:

> [W]e may consider evidence bearing upon that question [of whether the conduct of the election has the purpose or effect of denying or abridging the right to vote on account of race or color] in fashioning our remedy. Neither party has chosen to present such evidence. The Court considers the absence of such evidence as a factor weighing in favor of the State's position that the conduct of the election should not be enjoined.

App. F at 44a.[8] Notwithstanding the Court's claims, it has no discretion to refuse to enjoin an impending violation of §5 or to permit any violation of §5 to effect a permanent change in the law.

Where a covered jurisdiction has administered or is preparing to admimister a new voting procedure which has not been precleared under §5, plaintiffs may seek relief from a local district court. This Court has held that, at the very least, a district court must require the submission of such a procedure to the Attorney General. *Hampton County, supra*, 470 U.S. at 182. This Court has not yet explained whether a district court has discretion to permit a prospective violation to occur, or when the results of such a violation may retrospectively be allowed to stand. Nevertheless, the principles which have guided this Court's prior decisions clearly indicate that the District Court in this case erred

[7]Notwithstanding this conclusion, the District Court in its order of November 17, 1986, dismissed without explanation all §5 counts regarding the 1982 election. At least insofar as the setting of the date is concerned, that judgment should be reversed summarily with instructions that the date be submitted for clearance under §5. *Hampton County, supra*, 470 U.S. at 182-83; *Berry v. Doles*, 438 U.S. 190 (1978). Accord, 52 Fed. Reg. 486, 493 (1987) (to be codified at 28 C.F.R. § 51.17 (b)).

[8]In its opinion issued after trial, the Court again stated "that reasons or bases for equitable relief have not been presented that are alleged to have caused an injury resulting from a violation of Section 5 which are independent of Section 2 or which are independent of the alleged constitutional violations." App. A at 5a.

in both respects.

While this Court has never specified the factors which may be considered by a court in fashioning relief under §5, it has made plain that the presence or absence of discrimination may not be considered. "The question whether the [challenged procedure] had a discriminatory purpose or effect is not an issue at this stage of the §5 litigation: that question must be initially decided by the District Court for the District of Columbia or the Attorney General." *McCain v. Lybrand*, 465 U.S. 236, 250 n.17 (1984). Even where the Attorney General eventually approves a change, that approval is not relevant in designing retrospective relief. *Hampton County, supra*, 470 U.S. at 183 n.36. Accord, *United States v. Board of Supervisors*, 429 U.S. 642, 645-47 (1977); *Perkins v. Matthews*, 400 U.S. 379, 385 (1971). The Act places upon plaintiffs no burden of proving the discriminatory effect or purpose of a challenged procedure. The District Court plainly erred in predicating its denial of relief upon plaintiffs' failure to do so.

Indeed, prior decisions clearly indicate that, once the plaintiffs have established that a challenged procedure violates §5, they are under no burden to produce any additional evidence at all:

> Generally, statutes that are subject to §5 are ineffective as laws until they have been cleared by federal authorities. *Connor v. Waller*, 421 U.S. 656 (1975) (*per curiam*).

Hampton County, supra, 470 U.S. at 175 n.19. Surely, the burden cannot be upon the plaintiffs to prove that the general rule should be given effect. The very purpose of §5 was "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). The burden must be upon the State to overcome the "presumption that jurisdictions which had 'resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees' would be likely to engage in 'similar maneuvers in the future [...].' " *McCain, supra*, 465 U.S. at 245, quoting *South Carolina v. Katzenbach, supra*, 383 U.S. at 334-35. Since the State failed to present any evidence at all, it is indisputable that its burden has not been carried.[9]

[9]There is also a burden which rests upon the District Court in a §5 case. This Court made plain in *Connor v. Finch, supra*, that a court must carefully explain why it denies requested relief. In that case, the very District Court from which this appeal is taken created many legislative districts which appeared to perpetuate white control. This Court found it to be the duty of the District Court "to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." 431 U.S. at 425 (footnote

This Court has never rendered an opinion in a case where, as here, the plaintiffs have sought unsuccessfully to enjoin a prospective violation of §5. However, in *Holt v. City of Richmond*, 406 U.S. 903 (1972), this Court issued its own injunction in a case where the District Court had denied one. In that case, the Chief Justice, joined by Justices Blackmun and Rehnquist concluded, "I see no alternative but to grant the requested stay." Quoting the memorandum of the United States, he noted that " '[t]he legal effect of the...objection by the Attorney General, when coupled with the absence of a declaratory judgment from the United States District Court, District of Columbia, is to preclude the city from holding an election on an at-large basis.' " *Id.* (Burger, C.J., concurring).[10]

Justices Brennan and Marshall have gone so far as to express their opinion that a district court lacks discretion to deny retrospective relief, much less prospective relief:

> If, in cases like the present one, the remedy of ordering a new election is not to be required in all cases, the political units covered by §5 may have a positive incentive flagrantly to disregard their clear obligations and not to seek preclearance of proposed voting changes. For covered jurisdictions will then know that a §5 violation, if a suit is brought, can only result in their being denied the right to continue to enforce those voting changes that could not have received federal approval in the first place. As to all other voting changes, the sole effect of a suit for noncompliance with the approval provisions will be the limited sanction of requiring the political unit to obtain the federal approval which it should have received before any change was

[9]*Cont'd.*

omitted). This Court instructed the District Court to shape its remedy "so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished." *Id.*, at 425-26. In this case, the same District Court has made no attempt whatsoever to allay suspicions that the early June election was called to minimize black access to the election process, contenting itself with the conclusion that plaintiffs had failed to prove such a purpose or effect.

[10]In *Georgia v. United States*, 406 U.S. 903 (1972), the District Court had enjoined legislative elections because of an objection, but this Court stayed that injunction without explanation, apparently because of its doubts that §5 actually applied under the circumstances. See *Georgia v. United States*, 411 U.S. 526, 531 (1973). In this case, by contrast, the District Court had no doubt of the application of §5, but nevertheless refused to issue an injunction as this Court had done in *Holt*.

instituted.

Berry v. Doles, supra, 438 U.S. at 194-95 (Brennan, J., concurring). For this Court now to make clear that a district court should always enjoin prospective conduct found to violate §5 would be fully consistent with these precedents. Indeed, that has been the almost universal practice of the district courts. See generally *Herron v. Koch*, 523 F. Supp. 167, 173 (E.D.N.Y. 1981) (citing cases); *Coalition to Preserve Houston v. Interim Board of Trustees*, 494 F. Supp. 738 (S.D. Tex. 1980).[11]

It is apparent that Congress did not intend to afford the district courts in the covered jurisdictions discretion to permit prospective violations of §5. The report of the ten senators who sponsored the 1970 amendments to the Act was quite explicit in this regard.[12] Quoting from a report of the Civil Rights Commission, the senators described the nature of a suit under §5:

> Such a lawsuit is very expeditious. The only proof required is that the new State provision relates to voting, that it has modified the law in effect as of November 1, 1964, and that is has not been submitted to the Attorney General or the District Court of the District of Columbia. No proof is required that the change has a discriminatory effect. On this showing, *injunction follows as a matter of course.*

116 Cong. Rec. 5527 (1970) (emphasis added). Cf. *Berry v. Doles, supra*, 438 U.S. at 195 (Brennan, J., concurring). In revising the bailout provisions of the Act in 1982, Congress made plain the seriousness with which it regards any violation of §5:

> The rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced without preclearance, but thereafter while it remains in force

[11]There is only one reported decision in which a district court has denied a request to enjoin an upcoming election which violated §5. *United States v. County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala. 1976), aff'd on other grounds, 430 U.S. 934 (1977). In distinguishing *Hale County* as a precedent, the District Court stated in *Herron*: "Three elections had already been held uner the challenged changes, so an injunction would merely have allowed incumbents to remain in office who had themselves been improperly elected." 523 F. Supp. at 174.

[12]There was no report of the Senate Judiciary Committee in 1970. This Court has previously regarded the report of the ten sponsoring senators as authoritative. See, e.g., *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 133 (1978).

> without having been precleared. Therefore, this requirement applies even if the voting change, when ultimately submitted, was not found objectionable.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 48 (1982) [hereinafter cited as 1982 Senate Report]. Accord, H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 42 (1981). See also 1982 Senate Report at 58-59 & n.197 (expressing continuing reservations about courts outside the District of Columbia).

From its earliest encounters with §5, this Court has always ordered at least prospective relief for §5 violations. *Berry v. Doles, supra*, 438 U.S. at 191; *Allen, supra*, 393 U.S. at 543. Now that the scope of §5 has become generally understood throughout the covered jurisdictions, the district courts have shown themselves much more willing to grant retrospective relief. Indeed, in *Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala. 1986), the Court rejected the very result reached by the District Court in this case:

> [T]he very use of the word "preclearance" in the context of now submitting the actions of the Alabama Attorney General for such review is a misnomer, revealing the hollow nature of this claim. The law requires that changes in election rules be precleared. Unless there are unusual circumstances, changes may not be instituted now in the expectation of post facto ratification at some indeterminate future time.

Id., at 1201-02. The Court continued:

> In this case it is abundantly clear that any change in the anti-crossover rule had to be precleared pursuant to Section 5. To allow this election result to stand would reward the perpetrator who deliberately caused a violation of its provisions. This is surely inappropriate under *Allen* and *Perkins*. See also *Dotson v. City of Indianola*, 514 F. Supp. 397 (N.D. Miss. 1981) (three-judge Court), aff'd 456 U.S. 1002, 102 S. Ct. 2287, 73 L.Ed.2d 1296 (1982).

Id., at 1203. Accord, *Coalition to Preserve Houston, supra.*

If the District Court in *Henderson* is correct, then the District Court in this case must be wrong. The *Henderson* Court's refusal to permit the defendant to gain even a temporary advantage from a violation of §5 is perfectly consistent with the expressed intent of Congress to protect voters from all unauthorized changes in voting procedures, even when those procedures may ultimately be approved by the Attorney

General. 1982 Senate Report at 48. See also *Hampton County, supra*, 470 U.S. at 183 n.36. Certainly, Congress did not intend any jurisdiction which violated §5 to obtain a permanent advantage from its defiance of the law. In this case, there was no question that the setting of the election date had to be precleared; indeed, the State had submitted the date for preclearance, but chose to go forward without proper approval. This is not a temporary election of officials which can be altered at the next election, but a permanent change in the law, which can be amended only through the complicated procedures of §273 of the Mississippi Constitution. Before now, no district court has ever approved the permanent effectuation of such a change in violation of §5; this Court should take this opportunity to make sure that no court ever will.

II. THE DISTRICT COURT ERRED IN IGNORING PRECEDENT WHICH REQUIRES TRANSFERS OF GOVERNMENTAL AUTHORITY TO BE APPROVED UNDER §5.

Since 1890, §112 of the Mississippi Constitution has provided that "no county...shall be denied the right to levy county and special taxes." H.C.R. No. 41, however, amended this section to "deny or limit a county or other taxing authority the right to levy county and/or special taxes on nuclear-powered electrical generating plants," and to authorize "a special mode of valuation, assessment and levy upon nuclear-powered electrical generating plants and provide for the distribution of the revenue derived therefrom." Passage by less than 51% in the special election coupled with the provisions of H.B. No. 388 giving the State Tax Commission taxing jurisdiction over nuclear reactors resulted in a reallocation of taxing power over the facility from the Board of Supervisors to the State.

Taken together, the measures in question clearly resulted in a change in a "standard, practice or procedure with respect to voting," requiring preclearance under §5. The District Court's dismissal of these claims by summary judgment was error. As early as 1978, the court charged by Congress with the responsibility for providing definitive interpretations of §5 concluded that preclearance is required with respect to any change involving reallocation "of governmental powers among elected officials voted upon by different constituencies." *Horry County v. United States*, 449 F. Supp. 990, 995 (D.D.C. 1978).

A subsequent decision from the Northern District of Alabama reaches the same conclusion on a set of facts remarkably parallel to those of

the instant case. Seventy-eight percent of the total population of Greene County, Alabama, is black. Pursuant to state statute, the County Racing Commission was charged with the responsibility of managing a local race track which, as described by the Court:

> generated $1,300,000 in tax revenue [in 1984] for the county's general fund. During that same year the county's total budget was $2,055,000. The race track thus was responsible for 63% of the total budget of Greene County. Not only [was] the race track the largest source of county revenue, but it [was] also the major employer in the county.

Hardy v. Wallace, 603 F. Supp. 174, 176 (N.D. Ala. 1985).

The Commission running the track consisted of three white members appointed by the legislative delegation representing Greene County in the State House and Senate. Following implementation of a court-ordered reapportionment plan, it became apparent that blacks would be elected to these positions. The legislature then enacted a statute providing that the Racing Commission "should consist of three persons appointed by the governor of the state for terms of eight years." *Id.* Following an attempt by the newly-elected black officials to have the "wholly unprecedented", *id.*, at 177, obstruction to local legislation repealed, suit was brought to enjoin its implementation under §5. Quoting *Horry County, supra*, 449 F. Supp. at 995, the Court granted the requested relief, concluding:

> [T]he change involved *reallocates governmental powers among elected officials voted upon by different constituencies*. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements.

Hardy, supra, 603 F. Supp. at 178 (emphasis supplied by *Hardy* Court).

The fact that this case involves a nuclear reactor and *Hardy* a race track is the only real distinction between Greene County, Alabama, and Claiborne County, Mississippi. The former county is seventy-eight percent black while the latter is seventy-four. The sequence of events and results are identical: a white-controlled legislature targeting *the* major source of revenue in a black-controlled political subdivision and reallocating governmental power in a way which deprives blacks from exerting political and economic influence.

Such wholesale transfers of power clearly have "a *potential* for discrimination." *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 42 (1978) (emphasis in original). This Court itself

has recognized that §5 may cover "the basic reallocation of authority from the state legislative delegation to the Council." *McCain, supra,* 465 U.S. at 250 n.17. Recognizing the authority of *McCain, Hardy,* and *Horry County,* the Justice Department has recently acknowledged the need for "a sufficiently clear principle...distinguishing covered from non-covered reallocations." 52 Fed. Reg. 486, 488 (1987). This Court should provide such guidance by reversing the judgment of the District Court.

III. THE DISTRICT COURT ERRED IN HOLDING THAT STATE ACTION CONTRARY TO STATE LAW CANNOT COME WITHIN THE SCOPE OF §5.

The District Court's holding in this case creates a conflict as to whether violations of state law by state officials can ever contravene §5 of the Voting Rights Act. The courts in *Henderson v. Graddick, supra,* and *Curry v. Baker,* 802 F.2d 1302 (11th Cir. 1986), reached a conclusion diametrically opposed to the holding below, causing a conflict which will necessarily be resolved by this Court's judgment on this appeal.

At trial the plaintiffs proved that the state election commission violated established Mississippi statutory law by failing to print the entire proposed amendment and the concurrent resolution on the ballots in the June, 1986, and November, 1982, elections, as required by Miss. Code Ann. §23-5-141. Nevertheless, in rejecting the plaintiffs' §5 claim, the District Court stated:

> [W]e do not find that these omissions constituted a change within Section 5, and we rely for that proposition on the rationale of *United States v. St. Landry Parish [School Board],* 601 F. 2d 859 [(5th Cir. 1979)], which held that actions of State officials that are in conflict with the State's required procedures are not a change enacted or administered by the State within the meaning of Section 5, and therefore, the subject matter of the failure to print the text on all of the ballots is not within the ambit of Section 5 of the Voting Rights Act.

App. A at 5a - 6a. Using the same reasoning, the Court held that a violation of §273 of the Mississippi Constitution, which forbids packaging two separate amendments together for a single vote, could not violate §5. *Id.*, at 6a.[13]

[13]In its summary judgment order the Court had earlier dismissed the claim that the State violated §5 in adopting H.B. No. 388 without prior constitutional authorization.

The District Court's holding directly conflicts with *Henderson v. Graddick, supra*, in which the Attorney General of Alabama, a candidate for governor, encouraged participants who had voted in the Republican primary to cross over and vote in the Democratic gubernatorial runoff. This suggestion violated the Democratic Party's anti-crossover rule. 641 F. Supp. at 1194. In holding that the Attorney General's actions had to be precleared under §5, the Court stated:

> Once a law has been precleared it may be enforced whenever violated, and *any* change in the law or *any* practice inconsistent with the law must itself be precleared or be a violation of Section 5.

Id., at 1201 (emphasis added). Accord, *Curry v. Baker, supra,* 802 F.2d at 1311.

Moreover, the District Court's interpretation of *St. Landry* is incorrect. The Fifth Circuit focused on whether a vote-buying scheme by several poll commissioners was a change that the state "has enacted or sought to administer". The Court noted that a state does not generally "enact or administer" a new voting procedure every time a state official deviates from the state's voting procedures, but stated:

> The commonsense meaning of "shall enact" indicates that action of a state, *as a body*, is envisioned and we think "shall seek to...administer" was added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing authority.

601 F.2d at 864 (emphasis in original). Although the actions of the poll commissioners in that case did not rise to the level of state involvement needed to come within §5, the failure to use proper ballots in Mississippi has been "widely administered with at least the implicit approval of the state" over a number of years, and plainly falls within the scope of §5 as interpreted in *St. Landry*.

The District Court's misinterpretation of *St. Landry* reduces the effectiveness of §5 and paves the way for severe voting rights violations by permitting state officials to do indirectly what the state is prohibited from doing directly. This Court has stated that:

> [I]n determining if an enactment triggers Section 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination. See *Georgia v. United States,*[411 U.S. 526,] 34 [(1973)]; *Perkins v. Matthews, supra*, at 383-385;

Allen v. State Board of Elections, supra, at 555-556, n. 19, 558-559, 570-571.

Dougherty County, supra, at 42 (emphasis in original). Obviously, the violation of state law by state officials has a substantial "potential for discrimination." For example, a state official may initiate procedures which intimidate or otherwise prohibit blacks from voting or an official may encourage voting in violation of state law like the Attorney General of Alabama did in *Henderson*. Under the District Court's interpretation of *St. Landry*, such behavior will proceed unchecked despite its clear "potential for discrimination."

This Court mandated that the provisions of the Voting Rights Act be interpreted broadly to effectuate the Act's purposes.[14] The District Court's holding that actions of State officials cannot constitute a violation of §5 clearly does not do so; consequently, this Court should adopt the reasoning and holding of the *Henderson* Court.

IV. THE DISTRICT COURT ERRED IN HOLDING PLAINTIFFS ESTOPPED TO ASSERT A DENIAL OF EQUAL ACCESS TO THE POLITICAL PROCESS UNDER §2 AND IN REQUIRING PROOF THAT THE ELECTION OUTCOME WOULD HAVE BEEN DIFFERENT HAD EQUAL ACCESS NOT BEEN DENIED.

The plaintiffs assert that the decision to hold the constitutional referendum in June instead of November shortened the campaign period and resulted in a denial to black Mississippians of equal access to the political process. These plaintiffs and others like them lacked sufficient opportunity to discover and explain the effects of H.C.R. No. 41 to the electorate, and black voters therefore lacked a full understanding of the ramifications of their vote. The District Court quite properly found this claim to state a cause of action under the Voting Rights Act:

> The position of this court is that while there is no guarantee under the Voting Rights Act to any voter that he has the right to cast an informed vote, it can be a violation of Section 2, given the appropriate circumstances, for the State to apply a procedure that has the effect of precluding an informed vote by black voters when that procedure does not have the same effect on other voters of the electorate.

App. A at 21a. This holding is fully supported by precedent and by

[14] Just this Term, the Court has held that even the annexation of a vacant lot may have a potential for discrimination. *City of Pleasant Grove v. United States*, ___U.S. ___, 107 S. Ct. 794 (1987).

the legislative history of the Act. *United States v. Post*, 297 F. Supp. 46 (W.D.La. 1969); 1982 Senate Report at 30 & n.119.

However, the District Court never conducted the detailed analysis of the evidence which the Act required. *Thornburg v. Gingles*,____U.S.____, 106 S. Ct. 2752, 2781 (1986). Instead, the Court simply found "that there was no denial of equal access to the political process in this case, because the evidence indicates that the black voter turnout was equal to if not greater than the white turnout in the June election." App. A at 29a.[15] Such a single-factor analysis is plainly insufficient under §2. Only last Term, this Court rejected an argument "that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes, as a matter of law, finding a §2 violation." *Thornburg, supra*, 106 S. Ct. at 2779.

The Court made no proper analysis because of its view that the lack of equal access to information made no difference to the outcome of the election "because people were going to vote their self interest." *Id.*, at 27a. The Court erroneously placed the burden on the plaintiffs to demonstrate that they could overcome that inertia had they had more time. The Court found the plaintiffs' evidence that they could have solicited support at the supervisors' convention in July to be "only conjecture," *id.*, at 28a,[16] and their "contention that a longer campaign period would have provided black voters greater access to information" to be "speculative." *Id.*, at 29a.

This notion that the plaintiffs have the burden of demonstrating damage resulting from a violation of the Voting Rights Act was squarely rejected by the District Court in *Henderson v. Graddick*:

> The relevant issue for the Court is not whether plaintiffs can prove that Mr. Graddick's violation in fact changed the outcome of the runoff, but only whether his actions "could have" affected the outcome.
>
> ...

[15]This factual finding is, at best, a half-truth. The State's own expert, Dr. Stanley, testified that black voter turnout in November was approximately twice the white turnout. Thus, the State's decision to hold the election on H.C.R. No. 41 in June had an indisputably retrogressive effect on black voting strength. *Beer v. United States*, 425 U.S. 130 (1976).

[16]This finding was expressly based upon the supposed "testimony of supervisor Brooks who said that he could have called a black supervisors' meeting" had he been asked. *Id.* A review of Supervisor Brooks's brief deposition reveals that he never gave any such testimony. On the contrary, he testified that the black supervisors association did not even exist until July, after the conclusion of the June election. Brooks deposition at 7-8.

> The June 24 runoff was so close, the number of illegal crossover voters so great, and Mr. Graddick's violation so flagrant, this Court cannot take the chance that Mr. Graddick received the Democratic nomination as a result of his illegal actions.

641 F. Supp. at 1204. Accord, *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Hamer v. Ely*, 410 F.2d 152 (5th Cir.), cert. denied, 396 U.S. 942 (1969); *Coalition for Education in Dist. 1 v. Board of Education*, 370 F. Supp. 42 (S.D.N.Y.), aff'd, 495 F.2d 1090 (2d Cir. 1974). The great undisputed but unmentioned fact in the District Court's opinion in this case is that H.C.R. No. 41 received only 50.7% of the vote, passing by a margin of 103,365 to 100,647. Ex. P-135. The District Court's refusal to set aside the election "where there is a serious violation and close election," *Henderson, supra*, 641 F. Supp. at 1204, is in stark conflict with *Henderson v. Graddick*.

Instead of determining the access of black voters to accurate campaign information, the District Court focused instead on its perception of the conduct of the plaintiffs. The Court ruled, "The evidence in this case shows that if blacks were denied access to information, it is because the plaintiffs and their group did not offer the information." *Id.* at 27a. The Court seemed especially impressed by its conclusion "that the deliberate decision had been made to litigate rather than campaign." *Id.* at 28a.[17] The Court's analysis betrays a misunderstanding of both the evidence and the law. It is nothing less than a holding that, regardless of the impact of the defendants' actions upon black voters, the plaintiffs are estopped to contest them because of their own actions.[18]

The only issue in a case under the Voting Rights Act is whether or not the Act has been violated. If black voters lack equal access to the political process, then it does not matter whether or not these plaintiffs did everything they could to improve that access. Simply put, there is no such thing as an equitable defense in a voting rights case. For instance, in *Henderson v. Graddick*, the District Court rejected a waiver defense almost identical to the argument upheld in this case. 641 F.

[17]The Court's criticism of this decision is scarcely comprehensible. The plaintiffs can hardly be blamed for failing to anticipate the Court's unprecedented decision to permit a concededly illegal election to proceed.

[18]The defendants' arguments, set forth at paragraph 7.b of the pretrial order, App. I, do not attempt to predicate their defense on the conduct of the plaintiffs. The Court's opinion thus resolved this case on a matter never placed in issue by the parties. It is hardly surprising, then, that the Court's grasp of the evidence is less than sure since the parties had no reason to present a full picture of the efforts made by the plaintiffs.

Supp. at 1199-1200. Accord, *City of Richmond v. United States*, 422 U.S. 358 (1975); *South Carolina v. United States*, 585 F. Supp. 418 (D.D.C. 1984); *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982); *City of Port Arthur v. United States*, 517 F. Supp. 987 (D.D.C. 1981), aff'd, 455 U.S. 917 (1982); *Dotson v. City of Indianola, supra; Higgins v. City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979).

Surely, Congress did not intend to place upon plaintiffs the burden of proving the extent of their own efforts to avoid a discriminatory result. Congress, like the courts, was well aware of the barriers faced by blacks in achieving equal access to the political process. This Court itself has recognized the discouragement that black participants in the political process may face where, as here, they must seek to overcome illegal activities by State officials. *Hampton County, supra*, 470 U.S. at 177 & n.24. See also *Kirksey, supra*, 554 F.2d at 145 n.13.

The evidence presented by the plaintiffs brings this case squarely within the legal principles announced in *Post, Henderson* and similar cases. They demonstrated, through experts and practicing politicians, that it takes more time and effort to educate black voters on particular ballot issues because of the past history of discrimination in Mississippi. Supervisor Brooks testified that "one of the problems with those constitutional amendments is that a lot of people don't read them, especially the semi-literate people that normally kind of rely on us to—when I say 'us,' people in office or leaders in the community to explain them to them." Brooks deposition at 18. The Court accepted the testimony that blacks "have lower education levels" and "less sophistication in politics." App. A at 26a. The Court concluded, "We do not accept that blacks are less intelligent as a class than whites; and to the extent the experts were saying that is part of the reason it takes longer to educate a black voter than a white voter, we don't accept it." *Id.* The plaintiffs agree with the District Court that the difficulties faced in educating black voters arise not from a lack of native intelligence, but from the history of discrimination which the Court properly found to have existed.[19] The plaintiffs do not understand the Court's defense of black intelligence

[19]The Court did suggest that these barriers could have been overcome in this case by a properly funded media campaign, since the plaintiffs "had access to millions of dollars in tax money." *Id.* The Court somehow overlooked the fact that, under Mississippi law, the plaintiffs lacked authority to use public funds in a political campaign. See Miss. Code Ann. §19-3-41 (1972); *State ex rel. Patterson v. Board of Supervisors*, 233 Miss. 240, 102 So.2d 198 (1958); *Adams v. First Nat'l Bank*, 103 Miss. 898, 60 So.770 (1913). White officials and interest groups, however, had extentive access to the news media. Exhibits P-107 and P-121.

as a rejection of the proposition that it in fact does take longer to educate a black voter than a white voter.[20]

In light of this history of discrimination, it is hardly surprising that Claiborne County's black supervisors, who until recently had been barred from the vote, should have felt intimidated from battling the Mississippi legislature at the polls. Their lack of "political clout", which the District Court somehow found to weigh in favor of the State, App. A at 30a, is in fact a result of the long history of racial discrimination which made the Voting Rights Act necessary in the first place. Even so, the Court itself recognized that the plaintiffs campaigned within their own county. *Id.*, at 22a. They also made preliminary contacts with supervisors in other counties. *Id.*, at 23a.

The Court neglected to note, however, that these plaintiffs were not the only black voters at work on this issue. The Chairman of the Black Legislative Caucus testified that he spoke to his constituents in Harrison County. Fredericks deposition at 18-19. Senator Anderson described the obstacles he faced in Hinds County educating his constituents on H.C.R. No. 41 and the ethics amendment which was also on the ballot. Anderson deposition at 18. Thus, regardless of the Court's views of the plaintiffs' efforts, it is apparent that black leaders did attempt to campaign on this issue, and they met substantial difficulties. Certainly, the Attorney General could seek relief on behalf of black voters; there is no reason that these plaintiffs cannot as well.[21]

Moreover, it is apparent that the Court erred in its assumption that these plaintiffs had all the information necessary for an informed vote. While these plaintiffs were reasonably well informed as to the Grand Gulf aspects of H.C.R. No. 41, they could not have known many of

[20]If the Court meant to reject that proposition, then its finding of fact is clearly erroneous. The plaintiffs' witnesses testified without contradiction that time and personal contact are of immense importance in spreading information throughout the black community. *Id.*, at 24a - 25a. The burden was on the State to demonstrate the falsity of that conclusion. *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144-45 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). This holding has been specifically endorsed by Congress. 1982 Senate Report at 29 n.114. Despite the State's burden, the District Court explicitly recognized that its only evidence on §2 came from its ecological regression expert, Dr. Stanley. App. A at 25a.

[21]The State asked the District Court to hold that these plaintiffs lacked standing to assert the rights of black voters denied equal access to campaign information. App. A. at 17a. The Court quite properly rejected this contention. *Id.*, at 21a. If the plaintiffs have standing to assert the rights of black voters, then it is entirely inconsistent for the District Court to hold that the plaintiffs' own actions preclude those voters from receiving relief.

the crucial facts regarding the provisions on reclassification of property taxes, and it was here that they would have had the greatest opportunity to find allies. Evidence which came to light after the election demonstrated that the amendment primarily helped the rich and was more damaging to the poor and middle class than originally believed. See, e.g., Ex. P-106, P-115. It defies reason for the District Court to suppose that the plaintiffs could have shared with voters information they themselves did not have.

Finally, if the plaintiffs were less active than they might have been, it was because of the very election procedure which brought them into court in the first place; as Supervisor Butler testified, they believed that the campaign period was too short to give them any chance of success. The Court's assertion that the plaintiffs "recognized that a campaign under these circumstances was not going to make any impression on people," App. A at 27a, completely overlooks what the circumstances were. The Court's assertion that two months is sufficient time to plan and execute a statewide political campaign, *id.*, at 28a, is simply wrong, as the Justice Department and Congress have previously recognized.[22]

It is not speculation but fact "that a longer campaign period would have provided black voters greater access to information." App. A at 29a. The record reflects without dispute that the defendants revealed the devastating effect of H.C.R. No. 41 upon the poor and middle class for the first time at the conventions of the tax assessors and the supervisors in July. Smith deposition at 11; Shaw deposition at 17-19. Black officials were present at those conventions. It is a fact that those black officials vote, and it is a fact that they explain issues to the voters they represent. Brooks deposition at 18.

The record is replete with evidence demonstrating that the more voters knew about H.C.R. No. 41, the less they liked it. As its chief Senate sponsor, Nevin Sledge, testified, "If we had had an election shortly after it passed, I was hoping for, you know, an overwhelming vote, and that's what I think we would have gotten earlier if we hadn't a good bit of active opposition on it." Sledge deposition at 29. Ray McGrath of the State Tax Commission's staff stated that if the voters had known how the Commission intended to administer the admend-

[22]In 1975 the Justice Department objected to a change in qualifying deadlines, noting its "inordinate burden...on potential independent candidates in terms of the resulting confusion, uncertainty and the limited period for obtaining the necessary petition signatures to qualify for the 1975 elections." Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 532 (1981) [hereinafter cited as 1981 House Hearings].

ment, "it is doubtful that electoral margins would have been adequate for passage, considering the narrowness of the vote for passage, without such baggage." Ex. P-96. The executive director of the assessors association stated that, had he known the truth in June, "I'd put an ad in the paper and told them to vote against it." Shaw deposition at 28. If plaintiffs are required to present better proof than this in an election as close as this one, then no election can never be set aside for Voting Rights Act violations, because the proof will always of necessity be speculative.

It is apparent that the key to the Court's decision was its judgment "that a campaign under these circumstances was not going to make any impression on people because people were going to vote their self interest." App. A at 27a.[23] Nevertheless, the experience in the legislature, which had wrestled with this issue for years, plainly proves that perceptions of self interest can change, given time and effort. In 1983, Barney Schoby, a black representative from Adams County, had strongly favored sharing the Grand Gulf revenues, but by 1986, he had come to understand the true motivations of the Mississippi legislature:

> And shame on you if you vote—shame on you if in the back—well, not your mind—but shame on you if it is in your heart that you are voting to take this money simply because you feel that it's too much money for a black county to supervise.

Joint Ex. 1 at 187-88.

Barney Schoby and his black colleagues in the House of Representatives understood the truth about H.C.R. No. 41. That is why they opposed it by a margin of 13 to 3, while their white colleagues favored it by a vote of 95 to 9.[24] The District Court plainly erred in not giving the plaintiffs a chance to present to the voters a case that they had so successfully presented to their black colleagues in the legislature.

V. THE DISTRICT COURT ERRED IN FAILING TO FIND A DISCRIMINATORY PURPOSE ON THE PART

[23]The Court quite clearly felt that residents of counties which would benefit from the Grand Gulf funds would overwhelmingly support the amendment. In fact, the testimony of both parties' experts shows that they did not. Compare Ex. P-144 with D-17. Whatever the explanation for this fact, it cannot be said that a full investigation and explanation of the complicated effects of H.C.R. No. 41 would not have affected the outcome of the election.

[24]The plaintiffs' expert, Dr. Allan Lichtman, testified that there was less than one chance in 100,000 that such a racially polarized vote would happen by accident. See Ex. P-145.

OF THE STATE IN ENACTING AND ADMINISTERING S.C.R. NO. 519, H.C.R. NO. 41 AND H.B. NO. 388.

Legislation which is racially neutral on its face nevertheless violates the Equal Protection Clause of the Fourteenth Amendment if "a discriminatory purpose has been a motivating factor in the decision." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977).[25] Once such proof has been made, "the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

This Court has previously affirmed findings of intentional discrimination based entirely upon circumstantial evidence. See *Rogers, supra*, 458 U.S. 622-27. The direct evidence of discrimination in this case is substantial. Charles Shepphard, the first black to represent Claiborne County in the House of Representatives, "was told not to bring a whole bunch of blacks to the Capitol to demonstrate in favor of Claiborne County's position when the committee was considering the Grand Gulf bill in 1980." App. A at 7a. The Court went on to find:

> Now, as far as Representative Shepphard is concerned, we feel that he was a truthful witness. We do not doubt his testimony that he overheard some persons during the course of the debate refer to "those niggers in Claiborne County"....

Id., at 14a. Such explicitly racist behavior and remarks were deemed sufficient in *Hunter* to show that race was at least one motivating factor in the legislative decision. 471 U.S. at 228-29.

"The legislative or administrative history" and "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports," *Arlington Heights*, 429 U.S. at 268, plainly demonstrate that the legislature repeatedly chose to narrow its focus to this single black county and to hamstring its black government as much as possible. The final legislation, H.B. No. 388, which was authorized by the constitutional amendments adopted pursuant to S.C.R.

[25]Discriminatory intent is also sufficient to establish a violation of the Fifteenth Amendment, *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982), and of §2 of the Voting Rights Act, *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The District Court properly held that the Tax Injunction Act, 28 U.S.C. §1341, does not bar actions brought under that Act.

No. 519[26] and H.C.R. No. 41,[27] applied only to nuclear power plants; that meant that Claiborne County would not share in tax revenues from conventional plants, such as the ones in Adams, Bolivar, Hinds, and Washington Counties, all of which have white governments. Because the final legislation imposed a 2% state tax in lieu of local tax, instead of distributing the tax base itself, Claiborne County has no tax base to which it can apply its own millage rate, and is required passively to accept such funds as the State should choose to give it. Finally, the level of the in-lieu tax was less than half the tax rate on other utility property in the State. Claiborne County was thus handed the smallest feasible share of the smallest feasible pie.

Despite this overwhelming direct and circumstantial evidence of racial motivation, the District Court believed that the perceived predominance of economic motivations precluded the need for any further analysis.[28]

[26]Because Vice Chairman Williams had assured Representative Shepphard that the 1982 amendment to §112 would have no effect on Grand Gulf, the plaintiffs had no reason to campaign against the popular ratification of S.C.R. No. 519. The apparent effort to deceive Representative Shepphard lends support to the allegation that S.C.R. No. 519 was adopted with discriminatory intent. Even in the absence of such intent, this evidence raises at least the suggestion of a discriminatory result, demonstrating that the District Court erred in rendering summary judgment against the plaintiffs on their §2 action against the 1982 amendment.

[27]H.C.R. No. 41 permits statutory alteration of the tax status of nuclear plants by a simple majority vote. This constitutes an exception to §70 of the Mississippi Constitution, providing that all tax measures must be passed by a three-fifths vote of both Houses. As this Court made plain in *Arlington Heights*, "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." 429 U.S. at 267. House Constitution Committee Chairman Capps testified, "I would be less than candid if I didn't say to you that we on the House side were making every effort to get at this—these tax dollars and distribute tham and make it as easy as we could." Capps deposition at 19.

[28]The Court never explained what those economic motivations were. In its answers to interrogatories, the State claimed, "Apparently it is simply not feasible to attempt to set up a structure whereby the ad valorem taxes collected on non-nuclear power generating plants are redistributed throughout the area which they serve." However, examples of just such distributions appear throughout the record, Ex. P-55, P-56, P-58, P-65, P-72, P-74, and Ray McGrath of the State Tax Commission testified that such a redistribution could easily be made. Indeed, the State finally stipulated as much in paragraph 8.g of the pretrial order. App. I. The State also argued that it wished to redistribute taxes because the costs associated with nuclear plants "are ultimately borne by the rate payers such plants serve." However, in paragraph 8.ee of the pretrial order, App. I, the State stipulated that the costs of conventional plants are also borne by the ratepayers, but the State did not choose to redistribute those taxes. In any event, there is no longer any burden to bear, since the Supreme Court of Mississippi has reversed

This Court rejected a similar mixed-motivation argument in *Hunter*, finding that animus toward some whites did not justify discrimination against blacks:[29]

> [A]ppellants make the further argument that the existence of a permissible motive for §182, namely the disenfranchisement of poor whites, trumps any proof of a parallel impermissible motive....[I]t is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mount Healthy [City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977),] supply the proper analysis....[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks... .

471 U.S. at 231-32.[30]

The proper analysis is to determine, without regard to other contributing factors, whether racial discrimination "was a 'but-for' motivation for the enactment" of the challenged legislation. *Id.* at 232. On this issue, the State had the burden of proof. *Id.*, at 228. The District Court never even purported to consider whether or not H.B. No. 388 and H.C.R. No. 41 would have been adopted in their present form absent the undeniable presence of racial discrimination. During the ten years this issue was before the legislature, both of these measures pass-

[28]*Cont'd.*

the decision of the Public Service Commission to pass through Grand Gulf costs to consumers. *State ex rel. Pittman v. Mississippi Public Service Commission*, No. 56,762 (Miss. Feb. 25, 1987).

[29]Thus, the Court's observation that the abandoned nuclear plant owned by the Tennessee Valley Authority in predominantly white Tishomingo County "was the subject of similar legislation," App. A at 14a - 15a, is beside the point. The TVA's payments in lieu of taxes for its nuclear plant and its other Mississippi property were used to build bridges across the Tennessee-Tombigbee Waterway, conferring a substantial benefit upon Tishomingo County. Exhibit P-80 at 7-9. Representative Shepphard sought "similar" treatment for Claiborne County, but his amendment to use Grand Gulf taxes to improve U.S. Highway 61 throughout its length in Mississippi was defeated. 1986 House Journal 309.

[30]There can be no doubt that the plaintiffs have succeeded in demonstrating a "racially discriminatory impact." *Id.* H.B. No. 388 and the authorizing provisions of H.C.R. No. 41 deprive a black majority legislative body of jurisdiction over the tax receipts from Grand Gulf, and transfer that authority to an overwhelmingly white legislature. Moreover, the tax reclassification provisions of H.C.R. No. 41 severely disadvantage blacks in order to benefit the overwhelmingly white owners of expensive homes. The testimony of Professor Marcum, Tax Assessor Thompson, and Board Attorney Barefield on this subject went completely unrebutted by the State.

ed through numerous variations, almost any one of which was more favorable to Claiborne County than the final form. Even in 1986, an overwhelming majority of the House wanted to impose a larger tax on Grand Gulf, thereby providing more funds for Claiborne County, but the leadership denied them a chance to vote on such a conference report, because of Chairman Merideth's clearly stated view that Claiborne County lacked the capacity to govern itself.

Whether or not the District Court performed the proper analysis, the primary underpinning for its legal conclusion that the legislature acted for valid economic reasons is a clearly erroneous finding of fact."[11] The Court stated:

> Thus, as far as the primary evidence the plaintiffs introduced to show that the legislation was racially motivated—that is, the comments that there was no government in Claiborne County, that their funds were mismanaged, we find has a factual basis unrelated to race. There was evidence that the funds that Claiborne County was misspending some of their money, and there was no evidence that was introduced by Claiborne County that would refute the inferences that we could draw from that evidence.

App. A at 13a - 14a. Thus, the District Court fell into the same fallacy condemned by this Court in *Hunter*: One may not deprive blacks of their voting rights simply by branding them as thieves.

In fact, there is no evidence that Claiborne County misspent any of its money. The District Court did not identify any, nor will the State be able to find any in this record. The plaintiffs introduced no evidence to the contrary, because the State had never put forth such a claim as justification for the challenged measures. On the other hand, the plaintiffs did prove criminal convictions of supervisors in Jackson County and the Clerk of the Board in Washington County, both of which have white governments and electrical generating plants. Even if this record did contain evidence of misspending by the plaintiffs, there is no explanation other than race for the legislature's failure to visit the same retribution upon Jackson and Washington Counties. Cf. *Gomillion v.*

[11] This Court has skeptically received prior attempts to mask racial discrimination as economically motivated. *City of Pleasant Grove, supra.*

Lightfoot, 364 U.S. 339 (1960).[32]

This Court has not hesitated to declare clearly erroneous the factual findings of District Courts where the right to vote is at stake. See, e.g., *Hunter, supra*, 471 U.S. at 225; *McCain, supra*, 465 U.S. at 258. Where important constitutional rights are at stake, this Court has even reversed factual findings which have been fully reviewed and approved by the highest court of a state. *N.A.A.C.P. v. Claiborne Hardware Co., supra*.[33] Because the District Court failed to engage in the analysis required by *Hunter*, this Court can reverse without finding the District Court's primary or subsidiary findings of fact to be clearly erroneous. Nevertheless, this Court should not shrink from the conclusion compelled by the evidence in this case. The Mississippi legislature was impelled to adopt this legislation by the attitude described by one of its members, Representative Fred Banks, to the House Judiciary Committee in 1981: "The attitude simply stated is that it is not a nigger's place to make decisions that affect white folks." 1981 House Hearings at 548. The white leadership of the Mississippi legislature simply could not stomach the fact that the black government of Claiborne County had control over the tax funds derived from Grand Gulf. The legislature believes that the place of the citizens of Claiborne County is to take the money the legislature gives them and to make no complaints. Under the Constitution of the United States, it is the place of citizens of Claiborne County to govern themselves, and it is the place of this Court to guarantee to them that right.

[32]The District Court also clearly erred in finding "that Claiborne County did not cooperate with the legislature in conducting the hearings on Grand Gulf." App. A at 13a. It is not clear whether the Court felt that this supposed lack of cooperation somehow justified the punishment imposed on the county by the legislature. Nevertheless, the finding itself cannot be supported by the record. Chairman Montgomery of the Senate Finance Committee testified that the county fully cooperated in the Committee's investigations. Representative Stubbs testified that he knew of no request for information from the House to the plaintiffs before October 28, 1985, the date of a letter from the interim study committee on property taxation to Tax Assessor Evan Doss of Claiborne County, a copy of which was sent to the Board. Ex. P-77, Appendix. That letter, which was not even addressed to the plaintiffs, requested massive amounts of information within two weeks. As Vice Chairman Williams's testimony made clear, most of this information was eventually provided by the plaintiffs. Ex. P-172.

[33]In that case, the Court went so far as to place upon the respondents the burden of filing a supplemental brief detailing the supposed record support for the findings challenged by petitioners. 458 U.S. at 896.

VI. THE DISTRICT COURT ERRED IN FINDING "POLITICAL CLOUT" TO BE A LEGITIMATE STATE INTEREST UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

H.B. No. 388 draws a distinction between citizens of Claiborne County and citizens of all other counties in Mississippi. All other counties are entitled to tax all utility property located within their boundaries. Claiborne County is denied this right. In upholding this distinction,[34] the District Court said, "The political and practical problems for not including other utilities constituted a reasonable explanation, as far as this court is concerned, as to why other utilities were not included." App. A at 14a.[35] The Court concluded, "Claiborne County...neither has the political clout nor, in this case, the equity of argument to overcome the demands of the rest of the counties." *Id.*, at 30a.

There can be no doubt that H.B. No. 388 is rationally related to the interest identified by the District Court; the representatives of the other 44 counties in the Grand Gulf service area decided that they wanted Claiborne County's tax money, and they took it. The question is whether sheer "political clout", the unbridled appetite of the majority to prey upon the minority, constitutes a legitimate state interest under the Equal Protection Clause. Because that clause has always been understood to protect "discrete and insular minorities" from defects in "the operation of those political processes ordinarily to be relied upon to protect minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), there can be no doubt that raw political will cannot constitute a legitimate interest.[36]

[34]The Court made findings on this issue, notwithstanding its conclusion that 28 U.S.C. §1341 barred its jurisdiction over the plaintiffs' constitutional claims. App. C. The Tax Injunction Act applies only when there exists a "plain, speedy and efficient" remedy in state court. Neither the Court nor the State has ever identified such a remedy, and the Court accordingly erred.

[35]In fact, there were no practical problems precluding the distribution of revenues from conventional plants. See n.28,*supra*.

[36]Conventional plants were deleted from the legislation by Chairman Simpson of the House Rules Committee, who began accumulating his political clout in the legislature in 1963, two years before the Voting Rights Act secured to the black citizens of Claiborne County their right to vote. Claiborne County's lack of the political clout which comes with seniority in the House is indisputably a direct result of a century of intentional discrimination against black voters. More particularly, it stems directly from the failure of this same District Court to provide fair representation for the county's black citizens. *Connor v. Finch, supra*, 431 U.S. at 424.

This Court recently struck down an effort by the Alaska legislature to distribute the massive revenues from the State's oil reserves. *Zobel v. Williams*, 457 U.S. 55 (1982). The State simply divided the bulk of these revenues among its citizens on the basis of the length of their residence in Alaska. The State claimed its intent was "to reward citizens for past contributions," *id.*, at 63; presumably, long-time citizens had greater political clout than did newcomers. This Court simply found that such an "objective is not a legitimate state purpose." *Id.* Even in splitting up a pile of money, something more than mere political will is apparently necessary to satisfy the Fourteenth Amendment.

In *Metropolitan Life Ins. Co v. Ward*, 470 U.S. 869 (1985), Alabama granted a lower tax rate to its domestic insurance companies. The State claimed that its law "encourage[d] the formation of new domestic insurance companies in Alabama." *Id.*, at 876. While such an argument is undoubtedly correct, this Court found the objective not to be legitimate. "Indeed, under the State's analysis, any discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another." *Id.*, at 882 n. 10.

Here, the District Court has found it a legitimate state purpose to favor the residents of 44 other counties at the expense of the residents of Claiborne County. Mississippi has no more legitimate interest in the revenues from Grand Gulf than Ahab had in Naboth's vineyard. I Kings 21. Under *Metroplitan Life* and *Zobel*, Mississippi is not simply free to distribute funds with regard to nothing but political clout. Consequently, these measures indisputably violate the Fourteenth Amendment.

CONCLUSION

The District Court's opinion is so plainly wrong in so many ways that this Court may reasonably conclude that there is no danger that it will ever mislead any other court. Were this case before the Court on a petition for certiorari, that conclusion might be sufficient to support a denial of the writ. Nevertheless, because this case was brought under §5 of the Voting Rights Act, Congress intended this Court to serve as the Court of first and last appeal. This Court has often intervened in the past to secure justice for Claiborne County's citizens, and it must now do so again.

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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